IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No. 345 of 1980

For Approval and Signature:

Hon'ble MR.JUSTICE K.M. MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

1 & 2 YES // 3 to 5 NO

PATEL KARSHANBHAI BABABHAI

Versus

PATEL BHAICHANDBHAI KHUSHALBHAI

Appearance:

MR SR SHAH for Petitioner

MR SURESH C SHAH for Respondent No. 1

CORAM : MR.JUSTICE K.M.MEHTA

Date of decision:21/6/2001

CAV JUDGEMENT

1. Patel Karsanbhai Bababhai, original plaintiff, appellant in the appeal, had filed Second Appeal before this Court against the judgment and decree dated 21st

August, 1980 passed by the Assistant Judge, Mehsana in Regular Civil Appeal No. 14 of 1978 wherein the learned Judge was pleased to dismiss the appeal and confirm the judgment and decree dated 4th November, 1977 passed by the Civil Judge (Junior Division) Patan in Regular Civil Suit No. 179 of 1970 wherein the learned Judge was pleased to dismiss the suit of the plaintiff.

2. The facts giving rise to the present Second Appeal are as under :-

2.1 There is a property -an agricultural land admeasuring 1 Acre and 29 gunthas bearing Survey No. 16 situated in the sim of village Mandotri of Taluka Patan [hereinafter referred to as, `the suit land property']. Shri Patel Karsanbhai Bababhai, Appellant-Original Plaintiff owns the said property. On the eastern side of the field, there is a Naliya going, on the west, there is another field of the plaintiff bearing Survey No. 13 as well as Survey No. 12 belonging to one Kashiram Lavji and on the south, there is a field bearing Survey No. 57 belong to one Ramchand Raichandbhai. The field of defendant bearing survey no. 14 is surrounded on its eastern side by Survey No. 16, belonging to the plaintiff and on the western side, by Nalia going from village Mandotri to village Borsal and whereas on the north, by Survey No. 13 of the plaintiff and on the south by Survey Nos. 15 & 16. It is, therefore, pertinent to note that there is a road passing to the west of the field of the defendant as well as there is a road passing to the east of the field of the plaintiff.

2.2 The appellant [original plaintiff] filed a Regular Civil Suit No. 179 of 1970 on 21st October, 1970 in the Court of Civil Judge [JD], Patan for declaration that the defendant [respondent herein] had no right to pass through his land bearing Survey No. 16 for going to the land of the defendant, bearing Survey No. 14 and for permanent injunction restraining defendant from entering into the field of the plaintiff. It was contended in the plaint that Survey No. 16 is divided into two portions, the northern half belongs to the plaintiff and the said portion is in his possession while the other half portion on the southern side belongs to the uncle of the plaintiff Shri Ambaram Bhaichand. It was also contended that for going to Survey No. 14 of the defendant, the way towards the south of that survey number from the Nalia going from Mandotri to Borsal. The said survey no. 14 is divided between its co-owners and other co-owners of that Survey No. 14 are using the said Nalia for their way to their field bearing Survey No. 14. It is also

contended that on the northern border of Survey No. 16 of the Plaintiff, just near Survey No. 12 on the South, there was one old well and the owner of the Survey No. 14 had a right of taking water from that well. It was also contended by the plaintiff that for the purpose of going to take water from the said well, the owners of survey no. 14 were going through the southern border of Survey No. 12 and for that purpose the owners of Survey No. 14 had purchased the land of Survey No. 12 touching the Nalia of about 10 feet north to south and 50 feet east to west, and therefore, the said strip of land adjoining to the field of plaintiff belongs to the defendant. The said well being old, had dried up before so many years and it has become useless and it is not being used by any persons; including the owners of Survey No. 14 for more than 5 to 7 years before the date of filing of the Suit. It was further alleged that the defendant, as one of the owners of Survey No. 14 had lost the purpose of coming to Survey No. 16 of the plaintiff for fetching water from the said well, and therefore, the defendant and other owners of Survey No. 14 have not used even that strip of land bearing Survey No. 12 which they had purchased for about seven years prior to the date of filing of the suit. It was stated that defendant had no right whatsoever to come to the field of plaintiff. It was also stated that there was no purpose or reason for the defendant to come to the field of the plaintiff ie., Survey No. 16. It was prayed, therefore, in the suit for declaration that defendant had no right to pass through the field bearing Survey No. 16 belonging to the plaintiff as well as for permanent injunction restraining the defendant from entering into and or making use of any portion of Survey No. 16 as a way for going to his field ie., to Survey No. 14.

2.3 The defendant had filed written statement Exh. 28. It was stated that the border of Survey No. 14 and 16 are not in dispute. The defendant has contended that the suit was not tenable in the present form. The defendant has contended that previously old survey no. 14 [admeasuring 1 acre and 20 gunthas] was Survey No. 304 and at the time of survey, the present survey number was given. Previously, there were two Survey Nos. 304 and 306 of the present Survey No. 14. The defendant has denied that there is a way for going to Borsal from Nadotri on the western side of Survey No. 14. He has contended that on the eastern side of his field, there are fields of other owners of Survey No. 14 and he has not got any way from them for going to his field. He has further submitted that Chatur Ramchand and Kantilal are the exclusive owners of the portions of Survey No. 14

situated on the western side. He has denied that he has got a way from Borsal and the eastern side of Survey No. 14 since the time immemorial. He has submitted that the way for going to Survey No. 14 [eastern portion] - Old Survey No. 304 is from the eastern way of Survey No. 16 and by the eastern shedha of Survey No. 16 by car way and then by northern shedha. He has enjoyed the said right of way from the plaintiff's field for man, cattle, cart, plough since time immemorial. He has also contended that he and other owners of Survey No. 14 were taking water from northern way of Survey No. 16 and they were taking water from Naliya on the northern side. The defendant has denied that he and other owners of other portions of Survey No. 14 were going to Survey No. 16 for taking water by southern shedha of Survey No. 12. Hence, defendant has denied that he was enjoying the right of way for men, cattle, carts, etc. since the time immemorial and he has also denied that he had made attempts to create a new right of way from the field of plaintiff, as alleged. He had prayed that suit of the plaintiff be dismissed.

2.4 On behalf of the plaintiff, Karsan Baba is examined vide Exh. 47. He has produced certified copy of Map Exh. 48 which shows that the portion of Survey No. 14, in possession of the defendant abuts the plaintiff's Survey No. 14. The record of right is produced at Exh. 49 which is in respect of the plaintiff's land. Jesang Bijal, Exh. 74, Javanji Ghemarji Exh. 76, Dalsinghji Mohanji Exh. 79, Bhaga Mohan Exh. 80, and Chhana Shanker Exh. 82 were the witnesses who were examined by the plaintiff. As regards documentary evidence, plaintiff had produced Fensal Patrak at Exh. 83 which shows that portion of Survey No. 14 is in existence previously when there were two Survey Nos. 304 - 306. Shri Manilal Viramdas Exh. 86 is the panch in respect of the panchnama Exh. 87 made on 28.11.1970. Mr. Shinde Exh. 92 has proved and produced the Panchnama Exh. 93 which shows the damage of Rs. 400/= caused to Variyali crops. Shri Chaturji Ravaji Exh. 90 was present when Mr. Shinde made the said panchnama. Bhaga Mohan Exh. 88 has proved and produced the Panchnama Exh. 89 to show the damage of Rs. 85/= caused to Bajri Crop in Survey No. 16. Lemba Kuma Exh. 94 has also proved and produced the said panchnama Exh. 89. These panchnamas have been made to show that by the user of the plaintiff's field his crops were crushed by the passage of carts, ploughs, etc.

2.5 On behalf of the defendant, the defendant himself is examined at Exh. 95. The pahani patrak of his field

is at Exh. 96. The pahani patrak of portion of Survey No. 14 in possession of his witness Chatur Ranchhod Exh. 102 is at Exh. 97. The pahani Patrak of Survey No. 306 is at Exh. 98. The pahani patrak of Survey No. 304 is at Exh. 99. Kashiram Lavji is examined at Exh. 100. He is also panch in respect of the panchnama Exh. 101 showing the existence of suit way. Shri Mulchand Madha and Gangaram Ishwar were examined at Exh. 103 & 104 respectively.

3. The Civil Judge (JD), Patan after considering the contentions raised by plaintiff as well as defendant and also after taking into consideration the oral as well as documentary evidence, has been pleased to hold by his judgement and decree dated 4th November, 1977 that there was no question of opening a new entrance in the eastern boundary of Survey No. 16 for the cart track. After examining the evidence of the defendant, it was held that the defendant has proved that he has engaged the right of way from Survey No. 16, as claimed for more than 20 years, for men, cattle, cart, plough, etc., and therefore, the plaintiff is not entitled to get reliefs as prayed for. Thus, the suit of the plaintiff was dismissed by the learned Judge.

3.2 Being aggrieved and dissatisfied by the judgment and decree passed by the learned Judge {JD}, Patan dated 4.11.1977, the plaintiff preferred an Appeal being Regular Civil Appeal No. 14 of 1978 before the Court of District Judge, Mehsana at Mehsana. The learned Assistant Judge, Mehsana by his judgment and order dated 21st August, 1980 has been pleased to dismiss the appeal filed by the plaintiff.

3.3 Being aggrieved and dissatisfied by the aforesaid judgement and order passed by the learned Judge, the plaintiff has filed the present Second Appeal before this Court on 10th December, 1980 in memo appeal. The appellant has raised two questions which are substantial questions according to law. The two questions of law as referred in the appeal are as under :-

1. Whether the suit contemplated by section 15 of the easements act for determination of the easement of necessity should be one filed by the dominant owner or could it also in due a defence in a suit by a servient owner, without claiming any substantial relief of declaration of the easement in question ?

2. Whether the question as regards the right of easement by way of prescription can be gone into without raising a specific issue in that behalf.

4. When the matter, reached before me for final hearing, Mr. S.R Shah learned advocate appeared for the petitioner and Mr. S.C Shah, learned advocate appeared for the respondent.

4.1 Mr. S.R Shah, learned advocate for the petitioner has relied upon Section 15 of the Easement Act, 1882 which provides acquisition by prescription. Section with explanations 1, 2 & 3 read as under :-

`15. Acquisition by Prescription - Where the access and use of light or air to and for any building having been peaceably enjoyed therewith, as an easement, without interruption, and for twenty years,

and where support from one person's land, or things affixed thereto, has been peaceably received by another person's land subjected to artificial pressure, or by things affixed thereto, as an easement, without interruption, and for twenty years,

and where a right of way or any other easement has been peaceably and openly enjoyed by any person claiming title thereto, as an easement, and as of right, without interruption, and for twenty years,

the right to such access and use of light or air, support, or other easement, shall be absolute.

Each of the said periods of twenty years shall be taken to be a period ending within two years next before the institution of the suit wherein the claim to which such period relates is contested.

Explanation I- Nothing is an enjoyment within the meaning of this section when it has been had in pursuance of an agrement with the owner or occupier of the property over which the right is claimed and it is apparent from the agreement that such right has not been granted as an

easement, or, if granted as an easement, that it has been granted for a limited period, or subject to a condition on the fulfillment of which it is to cease.

Explanation II- Nothing is an interruption within the meaning of this section unless where there is an actual cessation of the enjoyment by reason of an obstruction by the act of some person other than the claimant, and unless such obstruction is submitted to or acquiesced in for one year after the claimant has notice thereof, and of the person making or authorising the same to be made.

Explanation III-Suspension of enjoyment in pursuance of a contract between the dominant and servient owners is not an interruption within the meaning of this section.

4.2 Mr. S.R. Shah, learned advocate has relied upon the judgment of the Bombay High Court in the case of Lalubhai Praojibhai and others vs. Bhimbhai Dajibhai, reported in AIR (1928) Bom. 312 wherein the Bombay High Court has observed on page 315 as under :-

`The suit is not necessarily a suit brought by the dominant owner, but would include a suit brought by the servient owner in which the claim to which such period relates is contested. The servient owner has by the institution of his suit prevented the period of twenty years running in favour of the dominant owner. An owner of property who has been dispossessed can successfully bring a suit within twelve years of his dispossession and is not liable to be defeated by the defendant trespasser instituting during the pendency of the suit by the real owner another suit after the period of twenty years is completed.'

4.2.A Mr. S.C Shah, learned advocate for the respondent has submitted that the easement by prescription can be created in certain situation. What is easement by prescription has been relied upon in Halsbury's Laws of England Vol -XIV in paragraph 72 at page 36.

`72. Nature of prescription - An easement may be established by a court of law sanctioning

> anduphold ing under the doctrine of prescription a claim to the right founded upon its enjoyment. Inasmuch as the Court's sanction is given solely upon the presumption that the easement has in fact validly existed before the claim is made, it is not strictly accurate to regard the doctrine of prescription as a mode of creating an easement; it is rather a mode of establishing an easement.'

He has also relied upon Gale on Easements [Ist Edition] [Chapter IV] Establishment of Easements by Prescription wherein definition of prescription reads as under :-

> Definition of prescription - Prescription may be defined as : A title acquired by use or enjoyment had during the time and in the manner fixed by law. `Prescriptio est titulus ex usu et tempore substantiam capiens ab authoritate legis.'
>
> Modes of acquiring title -
>
> The mode of acquiring title to an easement by prescription may be considered with respect to :
>
> 1. The length of time during which the enjoyment must continue, whether (i) for the purpose of prescription at common law, or (ii) under the doctrine of lost grant, or (iii) by reference to the Prescription Act, 1832.
>
> 2. The persons against and by whom the enjoyment must be had.
>
> 3. The qualities of that enjoyment.

He submitted that in view of this position of law, the defendants have established before both the Courts below a right of prescription and both the Courts below have held that the defendants have proved a right of easement by prescription.

4.2.B The learned advocate for the respondent [original defendant] has relied upon the judgment of this Court in the case of Mer Nagajan Aala & Ors. vs. Punja Kana & Ors., reported in AIR (1981) Gujarat 141. This Court has observed in para-3 at page 142 as under :-

`It is no doubt true that the party who goes for the Court's assistance must establish its case in order to get the relief prayed for. But in this case, the title of the plaintiffs to their lands is not in dispute. Ordinarily, it is the incident of the proprietary right, to enjoy his property without any interference with his right by any of his neighbours. But in all civilized Nations, some such interference is recognised in the form of easement right and the easement right from its very definition is a right to burden another person's property for the more beneficial enjoyment of one's own property. From the very nature of things it is evident that the existence of such a burden is the matter of exception and unfettered enjoyment of one's property is the matter of general rule. Whoever wants the court to have the positive fact to be proved in his favour, has to make that fact good in a court of law. To put in a different way, it is the negative proposition from the very nature of things which is difficult to be proved. In a case like the one on hand, the plaintiffs cannot be asked to furnish negative proof but the absence of any right with the defendants. It is, therefore, obvious that the defendants have to make good their assertion of the positive fat, namely the existence of easement right as alleged by them.'

4.3 Mr. Shah has further submitted that in view of Section 15 of the Easement Act for establishing the claim under said section, the defendant has proved user of the said right for twenty years as of right, peaceably and openly, and therefore also, the condition precedent for proving the enjoyment of the said right under Section 15 has been established, and therefore, the defendant has successfully proved the said right in this behalf.

4.4 Relying upon the aforesaid citation, learned advocate for the respondent has stated that in this before the trial court, the defendant has contended that previously old survey no. 14 [admeasuring 1 acre 20 gunthas] was surveyno. 364 at the time of survey, the present survey number was given. He has also contended that there is finding of fact by the trial Court, after perusing the evidence and documentary evidence, that there is a way passing through the northern boundary of survey no. 16 for going to survey no. 14 and it was the duty of the plaintiff to make Panchnama at the time of

institution of the suit because in such type of suits, in absence of any documentary evidence, the position prevalent on the spot has great evidentiary value and importance. He has further submitted that when the learned Judge has also held that the plaintiff has himself admitted in paragraph 7 of the plaint that owners of survey no. 14 had a right to draw water from the well of survey no. 16 and for this purpose, they used to come to the well of the plaintiff through the Nalia to the east of survey no. 16 and souther boundary of survey no. 12. He has further contended that when the findings of the trial Court, there was a way which would pass to the north of Survey No. 16 from the Naliya to the east upto the well to the west and the present position shows that there is a way and water course from the well to survey no. 14 towards west of the well. These ways together constitute the whole way through out northern boundary of survey no. 16. Therefore, even according to the plaintiff, the defendant has a right to enter survey no. 16 from the nalia to the east and to go upto the well. So, there was no question of opening a new entrance in the eastern boundary of survey no. 16 for a cart-track. It was further submitted that the learned Judge has also held that after examining the evidence of defendant, it was held that the defendant has proved that he has engaged the right of way from Survey no. 16, as claimed for more than twenty years, for men, cattle, cart, plough, etc. and therefore, the plaintiff is not entitled to get reliefs as prayed for. He has further submitted that against the said judgment and decree passed by the learned Judge [JD], Patan dated 4th November, 1977, the plaintiff preferred an Appeal being Regular Civil Appeal No. 14 of 1978 which has also been dismissed by the learned Judge confirming the judgment and decree of the learned Judge.

4.5 Learned counsel for the respondent has submitted that in any view of the matter, this is Second Appeal and there are concurrent findings of facts arrived at by two Courts and in the Second Appeal filed by the appellant this Court may not interfere with the finding of fact. In this connection, he has also relied upon the judgment of the Hon'ble Supreme Court in the case of Kandiba Dagadu Kadam vs. Savitribai Sopan Gujar & Ors., reported in (1999) 3 SCC 722, wherein the Hon'ble Supreme Court has observed in paragraphs Nos. 4 & 5 at page 725, as under :-

`4. It has been noticed time and again that without insisting for the statement of such a

substantial question of law in the memorandum of appeal and formulating the same at the time of admission, the High Courts have been issuing notices and generally deciding the second appeals without adhering to the procedure prescribed under Section 100 of the Code of Civil Procedure. It has further been found in a number of cases that no efforts are made to distinguish between a question of law and a substantial question of law. In exercise of the powers under this section, the findings of fact of the first appellate court are found to have been disturbed. It has to be kept in mind that the right of appeal is neither a natural nor an inherent right attached to the litigation. Being a substantial statutory right, it has to be regulated in accordance with law in force at the relevant time. The conditions mentioned in the section must be strictly fulfilled before a second appeal can be maintained and no court has to the power to add to or enlarge those grounds. The second appeal cannot be decided on merely equitable grounds. The concurrent findings of facts howsoever erroneous cannot be disturbed by the High Court in exercise of the powers under this section. The substantial question of law has to be distinguished from a substantial question of fact. This Court in Sir Chunilal v. Mehta & Sons Limited v. Century Spg. & Mfg. Company Limited held that -

`The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affect the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law.'

5. It is not within the domain of the High Court to investigate the grounds on which the findings were arrived at, by the last court of fact, being the first appellate Court. It is true that the lower appellate court should not ordinarily reject witnesses accepted by the trial court in respect of credibility but even where it has rejected the witnesses accepted by the trial court, the same is no ground for interference in second appeal when it is found that the appellate court has given satisfactory reasons for doing so. In a case where from a given set of circumstances two inference are possible, one drawn by the lower appellate court is binding on the High Court in second appeal. Adopting any other approach is not permissible. The High Court cannot substitute its opinion for the opinion of the first appellate Court unless it is found that the conclusions drawn by the lower appellate court were erroneous being contrary to the mandatory provisions of law applicable or its settled position on the basis of pronouncements made by the Apex Court, or was based upon inadmissible evidence or arrived at without evidence."

5. Mr. S.C Shah, learned advocate for the respondent has also relied upon the judgment of the appellate Court particularly paragraph 40 of the judgement, wherein it has been stated by the learned Judge that the dispute about the interim injunction had reached in this court, which is indispute and had not granted interim injunction against the defendant after visiting the site. In support of the case, it can be reasonably believed that even the learned District Judge must have found the circumstances in favour of the defendant rather than the plaintiff, and it is because of that reason that he must have refused to grant interim injunction against the defendant. In view of the matter, I agree with the findings of both the trial Court as well as Appellate Court that defendant has succeeded to prove his easement of right of way by adducing cogent and reliable evidence and for that reason he must succeed in this litigation.

5.1 I have gone through the records of the case particularly the judgment of the trial Court, judgment of the appellate Court and other documentary evidence and oral evidence in this behalf. I agree with the findings of the learned Judge that in view of the evidence on

records by the plaintiff, it is not sufficient to negative the right of easement claimed by the defendant. On the contrary, the facts which have been brought on record during their cross-examinations support the defendant rather than the plaintiff. I also agree with the learned Judge, after considering the documentary evidence that the field of the defendant does not abut on the western naliya and the circumstances that between the field of the defendant of the western naliya the other persons have got their own lands, and therefore, defendants cannot have right of way through the western naliya. I also agree with the findings of the learned Judge that admittedly, the defendant has got a right to take water from the Well situated on the land of Survey No. 16 from the eastern naliya and then it can be reasonably believed that on the northern sedha of Survey no. 16, there must be a way upto the survey no. 14 through which the defendant can go. I come to the conclusion that when the well is situated near the sedha of survey no. 16 and when the survey no. 14 have got a right to take water from this land then it can be reasonably believed that the land near northern sedha of survey no. 16 must not have been under cultivation but must have been reserved to use the well. The learned Judge has also relied upon the facts that the plaintiff who is responsible for the damage of his own crop.

5.2 I have also gone through the provisions of the Easement Act, particularly Section 15, what is meant by prescription in Halsbury's Laws of England, what is meant by Easement under the commentaries of Gale on Easements and also the judgment of this Court in Mer Nagajam AAla & Ors. [Supra], I am of the view that the defendant has successfully proved that he has proved his right of prescription as per the provisions of Section 15 of the Act, and therefore, I am of the view that both the Courts below have given cogent and convincing reasons, after going through the oral as well as documentary evidence in this behalf, and therefore, the judgment of the learned Tribunal as well as the Appellate Court are upheld.

5.3 Though, Mr. S.R Shah, learned advocate for the petitioner has relied upon the memo of Second Appeal as well as judgment of the Bombay High Court in this behalf and evidence on record. In view of the judgment of the Hon'ble Supreme Court, wherein it has been specifically stated that concurrent findings of fact of both the courts below howsoever erroneous, cannot be disturbed under the provisions of Section 100 of the Civil Procedure Code. In this case, defendant has succeeded his right of easement. This is a mixed question of facts

and law in favour of the defendant. It is not proper for this Court to disturb that mixed question of fact and law in the Second Appeal particularly when both the trial Court as well as Appellate Court have relied upon the oral evidence and documentary evidence.

6. In view of the same, this Second Appeal is dismissed. No order as to costs.

[K.M Mehta, J.]

Prakash*